

EXHIBIT A

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WARNER BROS. ENTERTAINMENT INC.
8

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 SERENDIP LLC & WENDY CARLOS,
12

13 Plaintiffs,
14

15 v.

16 WARNER BROS. ENTERTAINMENT
17 INC.,

18 Defendant.
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20 WARNER BROS. ENTERTAINMENT
21 INC.

22 Counter-claimant,
23

24 v.

25 SERENDIP LLC, a New York limited
liability company, and WENDY
26 CARLOS, an individual,
27

28 Counter-defendants.

CASE NO. CV 08-07739 RGK (RCx)

The Honorable R. Gary Klausner

**FIRST AMENDED
COUNTERCLAIM**

DEMAND FOR JURY TRIAL

1 Without conceding that it bears the burden of proof as to any of these issues,
2 and reserving its right to add additional counterclaims as discovery progresses,
3 Defendant and Counter-claimant Warner Bros. Entertainment Inc. ("Warner
4 Bros.") hereby asserts the following counterclaims against Plaintiffs and Counter-
5 defendants Serendip LLC, a New York limited liability company ("Serendip") and
6 Wendy Carlos, an individual ("Carlos") (collectively, "Counter-defendants"):

7 **PARTIES**

8 1. Warner Bros. is a Delaware corporation with its principal place of
9 business in Burbank, California. Warner Bros. is the copyright owner and
10 distributor of the motion picture, "The Shining."

11 2. Warner Bros. is informed and believes that Serendip is a limited
12 liability company formed under the laws of the State of New York, with its
13 principal place of business in New York.

14 3. Warner Bros. is informed and believes that Wendy Carlos is an
15 individual residing in New York.

16 **JURISDICTION**

17 4. This Court has original jurisdiction over Warner Bros.' counterclaim
18 for copyright infringement pursuant to 17 U.S.C. § 101 *et seq.* under 28 U.S.C. §
19 1338(a).

20 5. This Court also has original jurisdiction over Warner Bros.'
21 counterclaim pursuant to 28 U.S.C. § 1332 in that it is a civil action between
22 citizens of different states in which the matter in controversy, exclusive of costs
23 and interest, exceeds \$75,000.

24 6. This Court also has supplemental jurisdiction over Warner Bros.'
25 counterclaim pursuant to 28 U.S.C. § 1367 in that the claim asserted herein is so
26 related to the claims asserted in Plaintiffs' complaint as to form the same case or
27 controversy.

BACKGROUND FACTS

7. At some time prior to the commencement of photography for "The Shining," Carlos, on her own behalf and on behalf of Trans-Electronic Music, Inc. ("Trans-Electronic"), entered into an agreement with Director Stanley Kubrick pursuant to which Carlos agreed to write, compose, arrange, orchestrate, and conduct the recording of music for the soundtrack of the film "The Shining."

8. On or about January 25, 1980, Trans-Electronic entered into a "Composer Loanout Agreement" with Peregrine Filmmaatschappij, N.V. ("Peregrine"), which provided that Wendy Carlos and Rachel Elkind would write, compose, arrange, orchestrate, and conduct the recording of music for the picture and trailer of "The Shining." The agreement was signed by Carlos as President of Trans-Electronic, and countersigned by Carlos and Elkind in their individual capacities.

9. The parties agreed that all works created pursuant to the Composer Loanout Agreement "is and shall be considered a 'work made for hire' for [Peregrine]"; and that "[Peregrine] is and shall be considered the author and composer of said material for all purposes." Trans-Electronic further agreed to "grant[] to [Peregrine] all rights which it may have in and to all said material" and to transfer all "rights of every kind and character whatsoever throughout the world, whether or not such rights are now-known, recognized or contemplated, and the complete unconditional and unencumbered title throughout the world in and to" music and arrangements "heretofore or hereafter written, composed, submitted...and invented by [Carlos] in connection with ['The Shining']."

10. Also on or about January 25, 1980, Trans-Electronic and Peregrine entered into a separate letter agreement (the "Letter Agreement") whereby the parties acknowledged that Trans-Electronic had produced a demonstration tape in connection with "The Shining" and that, for the additional sum of \$1,000, "all musical compositions contained in said demonstration tape shall be deemed

1 included within the music composed by [Wendy Carlos and Rachel Elkind] under
2 [the Composer Loanout Agreement].”

3 11. The works entitled “Dies Irae” and “Rocky Mountains” were
4 submitted to Peregrine under the Composer Loanout Agreement. Therefore,
5 under the terms of the Composer Loanout Agreement and the Letter Agreement,
6 (1) “Dies Irae” and “Rocky Mountains” are “works made for hire,” and (2)
7 Trans-Electronic granted to Peregrine all rights which it may have had in “Dies
8 Irae” and “Rocky Mountains.”

9 12. The work entitled “Clockworks” is contained in the demonstration
10 tape referenced in the Letter Agreement. Therefore, under the terms of the
11 Composer Loanout Agreement and the Letter Agreement, (1) “Clockworks” is a
12 “work made for hire,” and (2) Trans-Electronic granted to Peregrine all rights
13 which it may have had in “Clockworks.”

14 13. The work entitled “Nocturnal Valse Triste” is contained in the
15 demonstration tape referenced in the Letter Agreement. Therefore, under the
16 terms of the Composer Loanout Agreement and the Letter Agreement, (1)
17 “Nocturnal Valse Triste” is a “work made for hire,” and (2) Trans-Electronic
18 granted to Peregrine all rights which it may have had in “Nocturnal Valse Triste.”

19 14. Warner Bros. is informed and believes that Serendip is the
20 successor-in-interest to Trans-Electronic and is therefore bound by the Composer
21 Loanout Agreement and the Letter Agreement.

22 15. Warner Bros. is the successor-in-interest to the rights obtained by
23 Peregrine in the Composer Loanout Agreement and the Letter Agreement.

24 16. “Dies Irae” and “Rocky Mountains” were included in the soundtrack
25 for “The Shining,” which was released theatrically in the United States on or
26 about May 23, 1980. “The Shining,” and all of its component parts, was
27 registered for copyright by Warner Bros., Inc., the predecessor-in-interest to

1 Warner Bros. on July 31, 1980. The registration number for "The Shining" is PA
2 77-409.

3 17. "Clockworks" and "Nocturnal Valse Triste" were registered for
4 copyright by Warner Bros. as the employer for hire of Wendy Carlos and Rachel
5 Elkind. The registration numbers for "Clockworks" and "Nocturnal Valse Triste"
6 are, respectively, PA 1-621-074 and PA 1-621-069, effective March 2, 2009.

7 **FIRST CLAIM FOR RELIEF**

8 **(COPYRIGHT INFRINGEMENT – 17 U.S.C. § 501 et seq.)**

9 **(AGAINST SERENDIP AND CARLOS)**

10 18. Warner Bros. realleges each and every allegation set forth in
11 Paragraphs 1 through 17, inclusive, and incorporates them herein by this
12 reference.

13 19. At all relevant times, Warner Bros. and/or its predecessors-in-
14 interest have owned the copyrights to "The Shining" and all of its component
15 parts, including "Dies Irae" and "Rocky Mountains."

16 20. Warner Bros. has complied in all respects with Title 17 of the United
17 States Code, in obtaining certificates of registration from the Register of
18 Copyrights to secure the exclusive rights and privileges in and to its copyrights.
19 A copy of the certificate of registration for "The Shining" from the Register of
20 Copyrights is attached hereto as Exhibit A.

21 21. Warner Bros. is informed and believes that Serendip and Carlos
22 have infringed Warner Bros.'s copyrights by offering for sale, selling,
23 advertising, and distributing compact discs and/or other products that contain
24 "Dies Irae" (under the name "Title Music Dies" and "Clockworks Dies") and
25 "Rocky Mountains. Serendip's and Carlos's conduct as described above
26 constitutes infringement of Warner Bros.'s federal copyrights. Upon information
27 and belief, Serendip's and Carlo's conduct was and is willfully done with
28 knowledge of Warner Bros.'s federal copyrights.

1 22. As a result of Serendip's and Carlos's wrongful conduct, Warner
2 Bros. is entitled to injunctive relief and damages in an amount to be proven at
3 trial, but in no case less than \$75,000.

4
5 **SECOND CLAIM FOR RELIEF**

6 **(COPYRIGHT INFRINGEMENT – 17 U.S.C. § 501 et seq.)**

7 **(AGAINST SERENDIP AND CARLOS)**

8 23. Warner Bros. realleges each and every allegation set forth in
9 Paragraphs 1 through 22, inclusive, and incorporates them herein by this
10 reference.

11 24. At all relevant times, Warner Bros. and/or its predecessors-in-
12 interest have owned the copyrights to "Clockworks."

13 25. Warner Bros. has complied in all respects with Title 17 of the United
14 States Code, in obtaining certificates of registration from the Register of
15 Copyrights to secure the exclusive rights and privileges in and to its copyrights.
16 A copy of the certificates of registration for "Clockworks" from the Register of
17 Copyrights is attached hereto as Exhibit B.

18 26. Warner Bros. is informed and believes that Serendip and Carlos
19 have infringed Warner Bros.'s copyrights by offering for sale, selling,
20 advertising, and distributing compact discs and/or other products that contain
21 "Clockworks." Serendip's and Carlos's conduct as described above constitutes
22 infringement of Warner Bros.'s federal copyrights. Upon information and belief,
23 Serendip's and Carlo's conduct was and is willfully done with knowledge of
24 Warner Bros.'s federal copyrights.

25 27. As a result of Serendip's and Carlos's wrongful conduct, Warner
26 Bros. is entitled to injunctive relief and damages in an amount to be proven at
27 trial, but in no case less than \$75,000.

THIRD CLAIM FOR RELIEF

(COPYRIGHT INFRINGEMENT – 17 U.S.C. § 501 et seq.)

(AGAINST SERENDIP AND CARLOS)

28. Warner Bros. realleges each and every allegation set forth in Paragraphs 1 through 27, inclusive, and incorporates them herein by this reference.

29. At all relevant times, Warner Bros. and/or its predecessors-in-interest have owned the copyright to “Nocturnal Valse Triste.”

30. Warner Bros. has complied in all respects with Title 17 of the United States Code, in obtaining certificates of registration from the Register of Copyrights to secure the exclusive rights and privileges in and to its copyrights. A copy of the certificate of registration for “Nocturnal Valse Triste” from the Register of Copyrights is attached hereto as Exhibit C.

31. Warner Bros. is informed and believes that Serendip and Carlos have infringed Warner Bros.’s copyrights by offering for sale, selling, advertising, and distributing compact discs and/or other products that contain “Nocturnal Valse Triste.” Serendip’s and Carlos’s conduct as described above constitutes infringement of Warner Bros.’s federal copyrights. Upon information and belief, Serendip’s and Carlo’s conduct was and is willfully done with knowledge of Warner Bros.’s federal copyrights.

32. As a result of Serendip’s and Carlos’s wrongful conduct, Warner Bros. is entitled to injunctive relief and damages in an amount to be proven at trial, but in no case less than \$75,000.

FOURTH CLAIM FOR RELIEF

(UNFAIR COMPETITION – Cal. Bus. & Prof. Code § 17200 et seq.)

(AGAINST SERENDIP)

33. Warner Bros. realleges each and every allegation set forth in Paragraphs 1 through 32, inclusive, and incorporates them herein by this reference.

34. Warner Bros. is informed and believes that Serendip submitted an application to register a work entitled, “Rediscovering Lost Scores” and individual works contained in “Rediscovering Lost Scores” to the U.S. Copyright Office. Among the individual works contained in “Rediscovering Lost Scores” are “Dies Irae,” “Rocky Mountains,” “Nocturnal Valse Triste” and “Clockworks.”

35. Warner Bros. is informed and believes that Serendip informed the U.S. Copyright Office that “Rediscovering Lost Scores” and the individual works contained therein were not works made for hire.

36. Warner Bros. is informed and believes that Serendip represented to the U.S. Copyright Office that it owns the copyrights to “Rediscovering Lost Scores” and the individual works therein pursuant to a transfer of all rights by the authors. Warner Bros. is informed and believes that Serendip represented to the Copyright Office that Wendy Carlos and/or Rachel Elkind are the authors of “Rediscovering Lost Scores” and the individual works contained therein.

37. At the time of these representations to the U.S. Copyright Office, Serendip knew that, in fact, (a) “Dies Irae,” “Rocky Mountains,” “Nocturnal Valse Triste” and “Clockworks” are works made for hire; (b) Peregrine’s successor-in-interest is considered the author and composer of “Dies Irae,” “Rocky Mountains,” “Nocturnal Valse Triste” and “Clockworks” for all purposes; (c) Trans-Electronic had granted all rights in “Dies Irae,” “Rocky Mountains,” “Nocturnal Valse Triste” and “Clockworks” to Peregrine; and (d) Carlos and Elkind did not have the right to

1 transfer, and could not have transferred, any rights in "Dies Irae," "Rocky
2 Mountains," "Nocturnal Valse Triste" and "Clockworks" to Serendip.

3 38. In reliance on Serendip's false representations, the U.S. Copyright
4 Office issued copyright registration number SR 610-073 to Serendip for
5 "Rediscovering Lost Works" and individual titles contained therein. A copy of the
6 registration certificate is attached to the Complaint filed by Serendip and Carlos as
7 Exhibit B.

8 39. Warner Bros. is informed and believes that the U.S. Copyright Office
9 would not have issued copyright registration number SR 610-073 to Serendip for
10 "Rediscovering Lost Works" and individual titles contained therein if it had known
11 any of the following: (a) "Dies Irae," "Rocky Mountains," "Nocturnal Valse
12 Triste" and "Clockworks" are works made for hire; (b) Peregrine's successor-in-
13 interest is considered the author and composer of "Dies Irae," "Rocky Mountains,"
14 "Nocturnal Valse Triste" and "Clockworks" for all purposes; (c) Trans-Electronic
15 had granted all rights in "Dies Irae," "Rocky Mountains," "Nocturnal Valse Triste"
16 and "Clockworks" to Peregrine; and (d) Carlos and Elkind did not have the right to
17 transfer, and could not have transferred, any rights in "Dies Irae," "Rocky
18 Mountains," "Nocturnal Valse Triste" and "Clockworks" to Serendip.

19 40. Under the aegis of their fraudulent registration of, and claim to, the
20 copyright to "Dies Irae," "Rocky Mountains," "Nocturnal Valse Triste" and
21 "Clockworks," Serendip and Carlos have enriched themselves by selling compact
22 discs and other products containing "Nocturnal Valse Triste" and "Clockworks."

23 41. As a consequence of Serendip's actions, the public and the U.S.
24 Copyright Office have been deceived into believing that Serendip, and not Warner
25 Bros. owns the copyright to "Dies Irae," "Rocky Mountains," "Nocturnal Valse
26 Triste" and "Clockworks." Such conduct has, and will continue to, injure Warner
27 Bros.'s reputation and sale of music from "The Shining" by, among other things,

1 interfering with Warner Bros.'s ability to market and sell music and other products
2 associated with "The Shining."

3 42. Serendip's acts hereinabove alleged are unlawful, unfair and/or
4 fraudulent acts within the meaning of California Business and Professions Code
5 Section 17200 et seq.

6 43. As a result of the unlawful conduct described above, Serendip has
7 caused and will continue to cause, if not enjoined, substantial and irreparable
8 damage to Warner Bros., and to its business and reputation, the exact nature and
9 extent of which cannot be ascertained at this time, but which will be established at
10 trial, and for which there is no adequate remedy at law.

11
12 WHEREFORE, Warner Bros. prays for a judgment as follows:

13 1. That for the First Claim for Relief, for Copyright Infringement, that
14 Serendip and Carlos, and their agents, servants, employees, representatives,
15 successors, and assigns and all persons, firms, or corporations in active concert or
16 participation with any of said Counter-defendants, be immediately and
17 permanently enjoined from:

18 (a) Directly or indirectly infringing on Warner Bros.'s copyright
19 in "Dies Irae" or "Rocky Mountains" in any manner,
20 including generally, but not limited to distributing,
21 advertising, selling, and/or offering for sale any unauthorized
22 products which infringe Warner Bros.' copyrights.

23 (b) Effecting assignments or transfers, forming new entities or
24 associations or utilizing any other means or device for the
25 purpose of circumventing or otherwise avoiding the
26 prohibitions set forth in subparagraph (a).

27 2. That for the First Claim For Relief, for Copyright Infringement:

- 1 (a) Those Counter-defendants infringing upon Warner Bros.'s
2 copyrights "Dies Irae" or "Rocky Mountains" be required to
3 pay actual damages increased to the maximum extent provided
4 by law; or
5 (b) At Warner Bros.'s election, Warner Bros. be awarded, in the
6 alternative, statutory damages pursuant to 17 U.S.C. § 504(c);

7 3. That for the Second Claim for Relief, for Copyright Infringement,
8 that Serendip and Carlos, and their agents, servants, employees, representatives,
9 successors, and assigns and all persons, firms, or corporations in active concert or
10 participation with any of said Counter-defendants, be immediately and
11 permanently enjoined from:

- 12 (a) Directly or indirectly infringing on Warner Bros.'s copyright
13 in "Clockworks" in any manner, including generally, but not
14 limited to distributing, advertising, selling, and/or offering for
15 sale any unauthorized products which infringe Warner Bros.'
16 copyrights.
17 (b) Effecting assignments or transfers, forming new entities or
18 associations or utilizing any other means or device for the
19 purpose of circumventing or otherwise avoiding the
20 prohibitions set forth in subparagraph (a).

21 4. That for the Second Claim For Relief, for Copyright Infringement:

- 22 (a) Those Counter-defendants infringing upon Warner Bros.'s
23 copyrights "Clockworks" be required to pay actual damages
24 increased to the maximum extent provided by law; or
25 (b) At Warner Bros.'s election, Warner Bros. be awarded, in the
26 alternative, statutory damages pursuant to 17 U.S.C. § 504(c).

27 5. That for the Third Claim for Relief, for Copyright Infringement, that
28 Serendip and Carlos, and their agents, servants, employees, representatives,

1 successors, and assigns and all persons, firms, or corporations in active concert or
2 participation with any of said Counter-defendants, be immediately and
3 permanently enjoined from:

4 (a) Directly or indirectly infringing on Warner Bros.'s copyright
5 in "Nocturnal Valse Triste" in any manner, including
6 generally, but not limited to distributing, advertising, selling,
7 and/or offering for sale any unauthorized products which
8 infringe Warner Bros.' copyrights.

9 (b) Effecting assignments or transfers, forming new entities or
10 associations or utilizing any other means or device for the
11 purpose of circumventing or otherwise avoiding the
12 prohibitions set forth in subparagraph (a).

13 6. That for the Third Claim For Relief, for Copyright Infringement:

14 (a) Those Counter-defendants infringing upon Warner Bros.'s
15 copyrights "Nocturnal Valse Triste" be required to pay actual
16 damages increased to the maximum extent provided by law;
17 or

18 (b) At Warner Bros.'s election, Warner Bros. be awarded, in the
19 alternative, statutory damages pursuant to 17 U.S.C. § 504(c).

20 7. That for the Fourth Claim for Relief, for Unfair Competition in
21 violation of California law, that Serendip be and its agents, servants, employees,
22 representatives, successors, and assigns and all persons, firms, or corporations in
23 active concert or participation with Serendip, be immediately and permanently
24 enjoined from directly or indirectly in any manner claiming the rights and
25 benefits of having registered the copyright to "Dies Irae," "Rocky Mountains,"
26 "Nocturnal Valse Triste" and "Clockworks" with the U.S. Copyright Office.

27 8. That for the Fourth Claim for Relief, for Unfair Competition in
28 violation of California law, that Serendip be ordered to withdraw its claim to its

1 copyright registration of "Dies Irae," "Rocky Mountains," "Nocturnal Valse
2 Triste" and "Clockworks."

3 9. That for the Fourth Claim For Relief for Unfair Competition in
4 violation of California law, Serendip account for and pay over to Warner Bros. in
5 accordance with California law, all damages sustained by Warner Bros. and
6 profits realized by Serendip by reason of Serendip's unlawful acts herein alleged
7 and that those damages and profits be increased as provided by law;

8 10. That for all claims for relief, that Serendip and Carlos be directed to
9 file with this Court and serve upon Warner Bros. within thirty (30) days after
10 service on them of the injunctions herein prayed for, a written report, signed
11 under oath, setting forth in detail the manner and the form in which Serendip and
12 Carlos have complied with the Orders of this Court; and

13 11. That for all claims for relief, that Warner Bros. recover from
14 Counter-defendants its costs of this action and reasonable attorneys' fees.
15

16 DATED: April 2, 2009

Respectfully submitted,

CALDWELL LESLIE & PROCTOR, PC

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20 LINDA M. BURROW
21 Attorneys for Defendant WARNER BROS.
22 ENTERTAINMENT INC.
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DEMAND FOR JURY TRIAL

Defendant and Counter-claimant Warner Bros. Entertainment Inc. hereby
demands trial by jury in this action.

DATED: April 2, 2009

Respectfully submitted,

CALDWELL LESLIE & PROCTOR, PC

By



LINDA M. BURROW

Attorneys for Defendant WARNER BROS.
ENTERTAINMENT INC.